

NTSB Order No. EA-5310

Issued under delegated authority (49 C.F.R. § 800.24)
on the 21st day of August, 2007

Docket SE-17407

³ The Administrator has filed a motion to dismiss respondent's appeal for failure to file a timely appeal brief.

Rules of Practice.⁴

To be timely, respondent had to file his appeal brief on or before June 28, 2007. Although he filed the brief with a certificate of service reflecting a date of June 28, 2007, the envelope is postmarked June 30. Section 821.7(a)(4) states that where a "document bears a postmark that cannot reasonably be reconciled with the mailing date shown on the certificate of service, the document will be deemed filed on the date of the postmark."

In his response to the motion to dismiss, respondent states that the Board "has consistently accepted and otherwise found that postmarks within one or two days of the certificate of service are properly filed (citations omitted)." The actual standard consistently applied by the Board is strict adherence "to a policy requiring the dismissal, absent a showing of good cause, of all appeals in which timely notices of appeal, timely appeal briefs or timely extension requests to submit those documents have not been filed."⁵ Respondent has provided no explanation for the postmark being 2 days later than the date on the certificate of service. Under the circumstances, we must dismiss the appeal as untimely filed.⁶

⁴ Section 821.48(a) provides as follows:

§ 821.48(a) **Briefs and oral argument.**

(a) Appeal brief....each appeal must be perfected, within 50 days after the date on which the oral initial decision was rendered, or 30 days after the date on which the written initial decision or appealable order was served, by the filing, and simultaneous service on the other parties, of a brief in support of the appeal. An appeal may be dismissed by the Board, either on its own initiative or on motion of another party, where a party who has filed a notice of appeal fails to perfect the appeal by filing a timely appeal brief.

⁵ Administrator v. Binks, NTSB Order No. EA-5296 at 1 (2007), citing Administrator v. Hooper, 6 NTSB 559 (1988).

⁶ Respondent refers to Martinez v. Administrator, No. 01-16712, slip op. (11th Cir. Nov. 25, 2002), to support his argument, and states that the court "effectively hold[s] that a postmark within five days of the certificate of service was also correct given the circumstances of the case." That unpublished decision, having no precedential value, is distinguishable. In a one-paragraph *per curiam* opinion, the court held that, "[u]nder the unusual specific facts of this case," the rulings of the Board and law judge were arbitrary and capricious in "failing to find

In the absence of a showing of good cause to excuse his failure to perfect his appeal by filing a timely appeal brief or to submit a timely extension request for filing the brief after the deadline, dismissal of respondent's appeal is required by Board precedent and policy. See Binks and Hooper, supra.

ACCORDINGLY, IT IS ORDERED THAT:

Respondent's appeal is dismissed.

Gary L. Halbert
General Counsel

(..continued)
good cause for the untimely filing...." Martinez, supra, slip op. at 1. The Board explained the unusual facts of that case, and Mr. Martinez's attempt to show good cause for untimely filing, in its opinion below. See In the matter of David Antonio Martinez, NTSB Order No. EA-4925 (2001). Though unusual, those facts are not germane here. Whereas Mr. Martinez undertook to show good cause, respondent, in the instant case, makes no such attempt.